No. 27

IN THE

Supreme Court of the United States

October Term, 1948 '49

JOHN S. HAYNES

v.

SOUTHERN RAILWAY SYSTEM

Brief of Respondent in Opposition to Petition for Writs of Certiorari

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether, under Section 8(c) of the Selective Training and Service Act of 1940, this cause is rendered moot by the expiration of more than one year's reemployment, accepted without protest.

STATEMENT

The petitioner's statement respecting the *Haynes* case is incorrect in that it fails to point up the facts: that Haynes did not file his complaint *until fifteen months after the date of his reemployment;* and that the record discloses *no protest* made during those fifteen months after reemployment at the same job and classification he left and with seniority as of July 6, 1940, *the date of his original employment.*

The petitioner's statement is also inaccurate in that in fact the District Court's order of dismissal recites no authority whatever for the order; and, there being no District Court opinion, there is therefore no basis for petitioner's statement that *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, was the authority for that Court's order.

Finally, the appellant before the Circuit Court of Appeals made no claim that he was entitled to back wages and this aspect of the case, having not been urged before the Circuit Court, cannot be presented as a justiciable controversy to this Court. *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U. S. 458.

REASONS FOR NOT GRANTING THE WRIT

The decision of the Circuit Court is correct.

Petitioner contends that the District Court entered its Order of Dismissal upon the sole authority of *Trailmobile Company et al.* v. *Whirls*, 331 U. S. 40, which does hold that the statutory preference given to a veteran by the Act is effective for no more than the specified year. To that extent, petitioner's contention is correct. But respondent contends that there is authority in addition to the *Trailmobile* case sufficient to sustain the dismissal by the District Court.

Some of the separate and independent benefits of the Act may be said to be protection for one year, seniority, pay and status, together with the right to damages for violation of the Act by an employer.

There are numerous cases which hold that laches on the part of the returned veteran destroy his right to back pay.

In *Dacey* v. *Bethlehem Steel Co.*, 66 F. Supp. 161 (D. C. D. Mass.), the Court held that where the veteran delays an unreasonable length of time in enforcing his demands, it is unfair to the employer to be compelled to pay compensation for the interim period. In *Schreier* v. *Fishman Co.* (D. C., N. J.), February 4, 1947, 20 LRRM 2479, a

veteran first rejected the employment offered him by his former employer, and then accepted employment for a substantial period of time without protest of any kind, but later protested through the filing of a complaint alleging non-compliance with the Act. The Court said that the petitioner had forfeited his rights. One of the reasons given for this conclusion was that he "was given employment which was satisfactory and which he accepted and was paid for without protest against what he was paid." For this and other reasons no more persuasive than this one, the Court dismissed the complaint. See also *Azzerone* v. *W. B. Coon Co.*, 73 F. Supp. 869 (1947) (D. C. W. D. N. Y.).

In *Daniels* v. *Barfield*, 77 F. Supp. 283 (April 8, 1948, D. C. E. D. Pa.), the delay of a veteran for seven months after discharge to make formal demand for reinstatement and benefits under the Selective Training and Service Act was held so unreasonable as to amount to acquiescence in his employer's action and resulted in forfeiture of his rights under the Act.

The Court stated:

> "The very essence of Sec. 308(e) is that of promptness. Delay not only deprives the Court of the opportunity of rendering prompt aid to those entitled to it, but places the defendant at a disadvantage in being lulled into a false sense of security. I am of the opinion that the delay on the part of the plaintiff was unreasonable and amounts to acquiescence in the action of the defendant and accordingly results in a forfeiture of his right to reinstatement and of the incidental right to demand compensation for loss of wages and benefit."

In *Anglin* v. *C. & O. Ry. Co.*, 77 F. Supp. 359 (April 22, 1948, D. C. S. D. W. Va.), it was held that an unreasonable delay in enforcing a demand under the Selective Training and Service Act resulted in the refusal to award any compensation for the interim period. To the same effect is

Noble v. *International Nickel Co.*, 77 F. Supp. 352 (April 28, 1948, D. C. S. D. W. Va.).

In *Polansky* v. *Elastic Stop Nut Corporation*, 78 F. Supp. 74 (April 27, 1948, D. C. D. N. J.), it was held that a veteran's right to back pay was lost by laches.

It should be obvious and it is just that, if delay and acquiescence warrant a forfeiture of any right to back pay, all of the other independent benefits of Sec. 8(c) should likewise be held to be lost in similar fashion. The Court so held in *Cummings* v. *Hubbell*, 76 F. Supp. 453 (March 5, 1948, W. D. Pa.).

It is respectfully submitted that the delay of fifteen months evidenced by the record in this case between the date of reemployment and the filing of the complaint amount to laches and acquiescence in the entire situation such as to warrant a forfeiture of any rights Haynes may have had, had he acted within a reasonable time.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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